Supreme Court, U.S.
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No. 04-967

IN THE

Supreme Court of the United States

NORMA MCCORVEY,
formerly known as Jane Roe,
Petitioner,

v.

WILLIAM "BILL" HILL, Dallas County District Attorney
as successor in office to HENRY WADE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICI CURIAE* OF FORMER CALIFORNIA STATE SENATOR AND CURRENT CALIFORNIA STATE ASSEMBLYMAN RAYMOND S. HAYNES AND THE UNITED STATES JUSTICE FOUNDATION, IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should the original judgment in *Roe v. Wade* be vacated under FRCP 60(b) due to substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?
2. Is Petitioner Norma McCorvey entitled under FRCP 60(b) to any relief, substantive or procedural?
3. Should the Court, at a minimum, require a hearing to afford fundamental due process which would lead to determining whether *Roe v. Wade* should be reexamined?

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STATEMENT OF INTEREST OF *AMICI* [1]

Amicus former California State Senator and current California State Assemblyman Raymond S. Haynes has represented 800,000 Californians in the California Legislature. He was elected in 1994. In 1996, former Senator Haynes was

[1] Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici curiae*, has made a monetary contribution to the preparation or submission of this brief.

elected by the Senate Republican Caucus to serve as Republican Whip. In that position, he was responsible for generating Republican analyses for the thousands of bills that reach the Senate Floor. He also served as Chair of Constitutional Amendments Committee, Vice Chair of the Senate Judiciary Committee, Senate Health and Human Services Committee and the Public Employment and Retirement Committee, along with being a member of the Budget and Education Committees. In 2000, then-Senator Haynes served as the National Chairman of the American Legislative Exchange Council (ALEC), a national bipartisan organization of over 2,500 state legislators. Assemblyman Haynes represents his constituency in supporting Norma McCorvey's Petition for a Writ of *Certiorari*.

Amicus United States Justice Foundation is a 501(c)(3) non-profit, legal organization founded in 1979 that has regularly provided testimony on federal and state legislation involving fundamental conservative principles, including the constitutional rights of people of faith and in the protection of the unborn.

Both Assemblyman Haynes and the United States Justice Foundation urge this Court to grant *certiorari* so that Petitioner Norma McCorvey can bring before this Court the substantial factual and legal reasons why further prospective application of the *Roe* decision cannot be justified in the interests of women, their families, and our communities.

SUMMARY OF ARGUMENT

This case presents the question of whether prospective application of *Roe v. Wade* remains just and equitable given the changed factual and legal conditions surrounding abortions since 1973, and it goes to the heart of the balance that was struck in *Roe*. The district court denied Petitioner's Rule 60 Motion as untimely, stating that thirty years after *Roe* was too long. On appeal to the Fifth Circuit Court of Appeals, this matter was dismissed. Although the panel determined

that the district court had erred in concluding that Petitioner's Rule 60 Motion was untimely, the Court of Appeals held that the Motion was moot because the Texas statutes criminalizing abortion had been repealed by implication.

In this brief *amici* focus on a single legal point: *Whether Petitioner's request for relief under Rule 60 is moot because the Texas statutes that criminalized abortion have been repealed by implication.*

The Court of Appeal's finding of mootness rests on (1) the principle that lawsuits regarding the constitutionality of statutes become moot once the statute is repealed and (2) its reasoning that the Texas statutes that were at issue in *Roe* have been repealed by implication. However, the type of case that becomes moot after a statute is repealed is one challenging the constitutionality of a statute in order to have its enforcement enjoined. That is not this case. However, even it were, the mootness exception to that rule would apply here because Texas *is* likely to resume enforcing or else reenact the challenged laws if it ever gets the chance. Finally, the Texas statutes that were declared unconstitutional in *Roe* have not been repealed by implication because the later-enacted regulatory laws were intended by the legislature to regulate those abortions permitted by *Roe* and because an implied repeal will not be found where, as here, both enactments can be given some area of operation and effect.

ARGUMENT

I. IN *DIFFENDERFER* AND *FED'N OF ADVER. INDUS. EXECUTIVES*—CASES RELIED ON BY THE FIFTH CIRCUIT—PLAINTIFFS' CASES WERE MOOT FOR REASONS THAT DO NOT APPLY HERE.

The Court of Appeals found this case was moot because "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed," *McCorvey v. Hill*, 385

F.3d 846, 849 (5th Cir. 2004), citing *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15 (1972) and *Federation of Advertising Industry Executives v. City of Chicago*, 326 F. 3d 924, 930 (7th Cir. 2003). In *Diffenderfer*, a citizen-taxpayer group wanted the constitutionality of a law exempting commercially used, church property from liability for taxes to be evaluated in order to enjoin the effect of that law. By the time the case got to the Supreme Court, however, the law had been repealed and replaced by a substantially different statute. The Court held that plaintiffs' request for a declaratory judgment was moot because the statute in question had been repealed. In *Federation*, an advertising federation sought to enjoin, on First Amendment grounds, an ordinance restricting outdoor advertising of alcohol and cigarettes. While the case was pending, the Supreme Court ruled that a similar Massachusetts statute was unconstitutional. In light of that decision, the City of Chicago repealed the questioned ordinance and promptly moved to dismiss the case as moot. The district court did so, and the dismissal was affirmed on appeal.

The facts that made the *Diffenderfer* and *Federation* cases moot are akin to what the situation in this case would have been if, prior to review by the Supreme Court, Texas had repealed all of its criminal abortion statutes and replaced them with a law modeled on the Uniform Abortion Act approved by the ABA in 1972.[2] Had that happened, there clearly would have been no live issue to present to this Court. In contrast, the relief now sought by Petitioner is the exact opposite of that sought by the plaintiffs in *Diffenderfer* and *Federation*. Those plaintiffs sought to halt enforcement of unconstitutional laws. Consequently, when those laws were expressly repealed, there was no enforcement to put a stop to. This left the courts with nothing more they could have done

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[2] *See Roe v. Wade*, 410 U.S. 113, 146 (1973), n. 40.

that had not already been accomplished by repeal of the laws. That is the reason for the rule articulated in *Federation*:

> "Therefore, we, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction *request*, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar." *Id.* at 930. [emphasis added]

But Petitioner here is not *requesting* an injunction. To the contrary, she is asking this Court to revisit the constitutionality of the pre-*Roe* Texas abortion statutes so that enforcement of those laws can be *resumed*. This is relief that is still within the power of this Court to grant. Thus, the holdings in *Diffenderfer* and *Federation* do not apply to the facts or the relief sought in this case, and Petitioner's request is not similarly moot.

II. EVEN IF *DIFFENDERFER* AND *FEDERATION* WERE CONTROLLING, THE FIFTH CIRCUIT'S FINDING THAT THE MOOTNESS EXCEPTION DOES NOT APPLY, BECAUSE TEXAS IS "UNLIKELY" TO RESUME ENFORCING OR TO REENACT PRE-*ROE* ABORTION LAWS, IS ILLOGICAL.

Both the majority and the concurring Fifth Circuit opinions concluded that "[t]he Texas statutes that criminalized abortion . . . and were at issue in *Roe* have, at least, been repealed by implication." *McCorvey, supra,* 385 F. 3d at 849 (concurring opinion *Id.* at 850). Even assuming that *Diffenderfer* and *Federation*, *supra*, were controlling in this case, the Fifth Circuit's reasoning that the mootness exception does not apply is incorrect. Despite noting an exception in cases where "there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially

similar," the Court of Appeals held that "[t]his exception does not apply to the instant case." *Id.* at 849.

If the Fifth Circuit's finding were correct that the statutes at issue in *Roe* are impliedly repealed and unlikely to be reenacted, it would follow that the injunctive effect of *Roe* and its progeny are *unnecessary* and could be vacated without any effect. That *Roe* could be overturned without any effect is absurd, but that is the logical extension—and the legal consequence—of a finding that there is "no reason to believe" Texas would, if it could, either resume enforcing or else re-enact the pre-*Roe* statutes.

The holding of *Roe* is a continuing quasi-injunctive order. The decision operates as an injunction, restraining Texas prosecutors from enforcing Texas statutes criminalizing abortion. The Supreme Court has held that a party is entitled to be relieved from the constraints of an injunction or a consent decree when the objective has been achieved, thereby demonstrating that the injunction or consent decree is no longer needed. In *Board of Education of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237 (1991), the Court held that a finding that a school district was operating constitutionally and was unlikely to return to its past ways *mandated* the termination of a desegregation order. Similarly, the Second Circuit in *Patterson v. Newspaper & Mail Deliverers' Union*, 13 F.3d 33, 38 (2d Cir. 1993) held that it is appropriate to dissolve a consent decree when it can be shown that the objectives of the decree have been substantially reached. In *Alexander v. Britt*, 89 F.3d 194 (4th Cir. 1996), the Fourth Circuit, applying *Dowell*, held that relief from a court-imposed decree aimed at remedying past unconstitutional conduct was obtainable under *Fed. R. Civ. P.* 60(b)(5) to a party who demonstrated: (1) that for a reasonable period of time, (2) the party has complied in good faith with the consent decree, (3) to the point that the vestiges of past unlawful behavior have been eliminated to the extent practicable, and

the purpose of the decree has been satisfied. *Dowell, supra*, at 249-50. *See, also, U.S. v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995) (termination of antitrust decree requires defendant to "demonstrate that the basic purposes of . . . the decrees—the elimination of monopolies and restrictive practices—have been achieved.")

Logically then, if Petitioner were bringing her Rule 60(b)(5) motion simply to dissolve that quasi-injunction, such relief would be mandated, given the Fifth Circuit's finding. Certainly all of the criteria have been met under *Dowell* and *Alexander, supra,* for vacating the injunctive effect of *Roe* and its progeny, i.e., (1) for over 30 years, (2) Texas prosecutors have complied in good faith with *Roe*'s holding, and—or so claims the Fifth Circuit—(3) the vestiges of past behavior have been eliminated in that the Texas legislature is unlikely to reenact the state's pre-*Roe* abortion statutes. Implicitly, the Fifth Circuit's holding that Texas would not revive its criminal abortion laws compels the conclusion that *Roe*'s holding is no longer needed. And an injunction that is no longer needed should be vacated.

The flaw in this logic, of course, is that without the restraint of *Roe* and its progeny, Texas officials would be free to criminalize and prosecute abortions, and everyone knows it. The Fifth Circuit's holding that the mootness exception is inapplicable to this case is thus counterintuitive. Not only is Texas *likely* to criminalize abortion if given the chance, but Petitioner's extensive evidence that abortion does more to hurt women than help them makes a compelling case for why Texas *should.*

III. THE PRE-*ROE* TEXAS STATUTES THAT CRIMINALIZED ABORTION HAVE *NOT* BEEN REPEALED BY IMPLICATION.

A. Whether a statute has impliedly been repealed is a matter of legislative intent.

The question of implied repeal is essentially a question of what the legislature *intended* to be the effect of the later-enacted law. "In enacting statutes and amending codes, the legislature is presumed to have knowledge and to have considered the effect and result of a subsequent law upon a prior enactment." *Eppenauer v. Eppenauer,* 831 S.W. 2d 30, 34 (Tex. 1992). A legislative intent to repeal an earlier statute may be implied, for example, when the later enactment was clearly intended as a comprehensive treatment of the entire subject. *Gordon v. Lake*, 163 Tex. 392, 394, 356 S.W.2d 138, 139 (1962); *Meek v. Wheeler County*, 135 Tex. 454, 462, 144 S.W.2d 885 (1940).

In a 1980 Arkansas case dealing with the issue of whether an 1875 Act prohibiting abortion except to save the life of the mother was impliedly repealed by later legislation, *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980), a federal district court looked to the comprehensive nature of the later law in finding implied repeal. The 1969 Act was a Model Penal Code type statute that liberalized permissible abortions to include instances of health risks to the mother, fetal defect, and rape or incest; it also regulated abortions in various respects. Notably, both the 1875 Act and the 1969 Act dealt with the desired reach of criminal law in prohibiting abortion. The district court determined that the 1969 Act was intended to be a "substitute" for the prior law, based on the similarity of subject—the criminality of abortion—as well as its comprehensive nature. In contrast, the regulatory laws that the Fifth Circuit found to be in conflict with the pre-*Roe* prohibitory laws cannot in any way be deemed to be a "substitute" for the prior laws, e.g., trading a restrictive criminal law for a

liberalized criminal law. In asymmetric fashion, rather, the later-enacted laws respond to the void left by the removal of Texas' prohibitory laws, scrambling to regulate the vast class of abortions made legal by the Court. Other distinctions between the facts supporting the implied repeal found in *Smith* and the contrary scenario of this case are noted by this commentator:

> "It is critical that the legislature's liberalization of abortion law was not coerced by judicial action. The stricter 1875 Act was fully enforceable when the legislature chose to enact statutes less protective of the unborn. The newer Act must be seen as a free political act, rather than as the response of a legislature attempting to fill in a gap caused by a prior court ruling. By contrast, the abortion legislation enacted subsequent to *Roe* is largely an attempt to regulate abortions that have been legalized by the Supreme Court in *Roe*. Such legislation, which is designed to fill a need created by judicial invalidation of abortion prohibitions, cannot be fairly viewed as evidencing an intent to repeal prior prohibitions."[3]

In the recent case of *People v. Higuera,* 244 Mich. App. 429, 625 N.W.2d 444 (2001), a criminal defendant also advanced the argument that a pre-*Roe* abortion prohibition was impliedly repealed by post-*Roe* abortion regulatory laws. Higuera, a medical doctor specializing in obstetrics and gynecology, was charged with violating Michigan's criminal abortion statute (enacted in 1931) for allegedly inducing the abortion of a 28-week-old fetus. Defendant moved to dismiss based in part on the argument that the law in question had been impliedly repealed by the legislature's subsequent enactment of laws that regulated, rather than prohibited, abortions.[4]

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[3] Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion,* 11 St. Louis U. Pub. L. Rev. 385, 399 (1992).

[4] The subsequent legislative enactments defendant relied on were statutes requiring parental consent, informed consent, and record keeping,

The appellate court noted first the fact that in *People v. Bricker*, 389 Mich. 524, 208 N.W. 2d 172 (1973), the Michigan Supreme Court had construed the same statute to conform to the dictates of *Roe* and *Doe v. Bolton,* 410 U.S. 179 (1973). Rather than finding it irreconcilably unconstitutional under *Roe* and *Doe*, the Court upheld the1931 law by simply exempting pre-viability abortions from criminal prosecution while deeming post-viability abortions (except to save the life of the mother) to still be covered by the statute. The court of appeals took issue with defendant's assertion that the legislature had impliedly repealed this statute, holding, rather:

> "After *Bricker* was decided in 1973, the Legislature enacted various statutes regulating the performance of abortions . . . but did not revise MCL 750.14; MSA 28.204. The Legislature is presumed to be aware of the *Bricker* Court's interpretation of MCL 750.14; MSA 28.204, which construction permits abortions to be performed in accordance with *Roe.* (citations) We think it clear that in enacting those statutes after *Bricker*, the Legislature intended to regulate those abortions permitted by *Roe* and *Doe,* and *Bricker,* and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution, as construed by the United States Supreme Court. We thus must reject defendant's argument that MCL 750.14; MSA 28.204 has been repealed by implication." 244 Mich. App. at 436-37.

By the same token, the Texas regulatory statutes at issue here were enacted in consultation with the Texas Attorney General's 1974 opinion outlining the types of regulations permitted under the *Roe v. Wade* opinion.[5] Consequently, it should similarly be clear that the Texas Legislature "intended

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providing immunity for those who refuse to perform abortions, prohibiting partial-birth abortions, and prohibiting Medicaid funding for abortions. 244 Mich. App. at 435.

[5] Op. Tex. Att'y Gen. No. H-369 (1974), 4-13.

to regulate those abortions permitted by *Roe* and *Doe* and did not intend to repeal the general prohibition of abortions to the extent permitted by the federal constitution as construed by the United States Supreme Court." *Hignera, supra. See, also, Eppenauer, supra.*

B. There is no implied repeal when both enactments can be given effect.

Under Texas law, "for repeal by implication to occur, the implication must be clear, necessary, irresistible, and free from reasonable doubt." *Ramirez v. State*, 550 S.W. 2d 121, 124 (Tex. 1977), citing *International Service Ins. Co. v. Jackson*, 335 S.W. 2d 420 (Tex. Civ. App., Austin 1960). On the other hand, if an apparent conflict between two enactments can be resolved and both enactments given some area of operation and effect, no implied repeal will be found. In the present case, subsequent abortion regulations can be reconciled with prior abortion prohibitions because, even under the pre-*Roe* law, some abortions were legal and thus subject to being regulated. That is what distinguishes this case from *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), relied on by the Fifth Circuit, where the statute at issue was deemed to allow no exceptions at all. As this commentator observed:

> "Under these almost unique circumstances [of a state's law providing no life-of-the-mother exception], an argument can be made that later regulatory provisions are in direct conflict, as the prior prohibition in theory left no legal activity to regulate. In the far more common instance in which the pre-*Roe* prohibition permitted legal abortions under some circumstances, subsequent regulations could be reconciled as a desire to regulate this class of legal abortions. That such a class of legal abortions might be very small would be irrelevant, given the presumption against implied repeal and the consequent command to avoid a finding of implied repeal when both

> statutes can be given *some* area of operation." [emphasis in original][6]

In finding an implied repeal, the Fifth Circuit thus ignored long-established rules of statutory construction. Unless there is a clear repugnance between the provisions of old and new statutes, "the duty of a court is to reconcile them and to construe both statutes so as to give effect to each." *Twin City Fire Ins. Co. v. Cortez,* 576 S.W.2d 786, 789 (Tex. 1978).[7]

A 1937 case involving a criminal defendant's challenge to a hunting law illustrates this principle at work. In *Wagers v. State*, 133 Tex. Crim. 420, 111 S.W.2d 714 (1937), the defendant appealed his conviction for killing a deer. He argued that a 1937 statute, which permitted the use of dogs in hunting, impliedly repealed the 1935 law under which he had been convicted, which mandated a five-year closed season for killing deer in the defendant's county of Montgomery. Defendant relied on language in the 1937 statute which provided, ". . . [I]t shall be lawful to use one dog for the purpose of hunting, pursuing, and taking of deer in . . . Montgomery . . . Count[y]." The court reconciled the seemingly inconsistent statutes by interpreting legislative intent to mean that the use of dogs is allowed only during those times that it is lawful to hunt deer in the named counties. In other words, *to the extent that hunting is allowed at all*, dogs may be used to hunt. So reconciled, the 1937 statute did not impliedly repeal the five-year hunting ban in Montgomery County. In the same way, the later-enacted regulatory provisions at issue in this case must be interpreted as embodying a legislative intent to regulate the practice of abortion, *to the extent that abortions are permitted at all.*

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[6] Smolin, *supra*, at pages 400-01.

[7] *Accord, Acker v. Texas Water Commission,* 790 S.W.2d 299, 301 (Tex. 1990), *Eppenauer v. Eppenauer, supra,* 831 S.W. 2d at 34. *See, also,* Tex. Gov't Code § 311.025.

The two seemingly contradictory sets of statutes may also be harmonized in another sense: *To the extent that the U.S. Constitution allows government to do so,* it is the Texas Legislature's intent to protect women from the dangers of abortion. In that connection, it will be recalled that the majority opinion in *Roe v. Wade* discussed the "three reasons [that] have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence." 410 U.S. at 147. The Court stated:

> "A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman . . . . Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy." *Id.* at 148-49.

Based on an assumption that abortion had been made safe for women, *Roe* determined that Texas' laws outlawing all abortions except to save the life of the mother were overly intrusive when weighed against the risk of abortion's harm to women. As such, the laws were ruled unconstitutional. Although limited in scope, later-enacted regulatory laws are in harmony with pre-*Roe* abortion prohibitions by their consistency with the legislative purpose of protecting women from the hazards of abortion.

Lastly, the apparent inconsistency between present-day Texas laws regulating the practices and procedures of abortion clinics and pre-*Roe* provisions criminalizing abortion can be harmonized by the fact that the two statutory schemes were not intended to be in force *at the same time.* The present-day statutory scheme was enacted to fill a gap while the pre-*Roe* abortion statutes are held in abeyance until their constitutionality can be revisited. This situation is somewhat analogous to the fact that fish and game laws that completely

prohibit fishing and hunting during off seasons coexist with other laws providing for issuing fishing and hunting licenses. The seeming inconsistency is reconciled by the understanding that the two schemes are not intended to be enforced simultaneously. As Professor Smolin stated in his article addressing the issue at hand:

> "It is historically common throughout the law of abortion and the law generally, to prohibit an activity under certain circumstances, while permitting it with regulations in other circumstances. The Model Penal Code formulation on abortion is based on a combination of prohibitions with exceptions, and accompanying regulations applicable to the exceptions. Thus, given the presumption against implied repeal, it would be erroneous to conclude that a regulatory provision such as a parental involvement statute had impliedly repealed a prohibition containing exceptions."[8]

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[8] Smolin, *supra*, at 413.

CONCLUSION

The Fifth Circuit's dismissal of Petitioner's appeal was based solely on its finding that, "because the statutes declared unconstitutional in Roe have been repealed, McCorvey's 60(b) motion is moot." *McCorvey, supra,* 385 F.3d at 849. As the foregoing discussion amply demonstrates, the Court of Appeals' finding of implied repeal of the challenged laws is not only logically unsound but unsupported by the law of Texas and other jurisdictions. Since the laws in question have not been repealed, Petitioner's motion does present a live controversy that may—and should—be considered on the merits. The petition for a writ of *certiorari* should therefore be granted.

Respectfully submitted,

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